A

TAKAKO SAKAO

v.

NG PEK YUEN & ANOR (NO 3)

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 02(f)-20-2009(W)]

C

26 NOVEMBER 2009

CIVIL PROCEDURE: *Costs - Power to award costs - Whether costs may be ordered against a non-party - Whether non-party ought to be warned at earliest opportunity that costs would be sought against him*

D

CIVIL PROCEDURE: *Execution - Declaratory order - Whether declaratory order capable of enforcement through the execution process - Whether a declaratory order may be stayed*

CIVIL PROCEDURE: *Execution - Stay - Power of Federal Court to*

E

stay execution on judgments - Whether exercisable only in cases where an appeal is pending in the Federal Court - Whether such power exercisable in cases where a review is sought under r. 137 of the Rules of the Federal Court 1995 - Whether s. 80 of the Courts of Judicature Act 1964 in pari materia with s. 44 of the same Act - Whether s. 80 of the Act

F

ought to be similarly construed as s. 44

CIVIL PROCEDURE: *Judgments and orders - Declaratory order - Enforcement of - Whether declaratory capable of enforcement through the execution process - Whether a declaratory order may be stayed*

G

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Incidental directions and interim orders - Power of Federal Court to stay execution on judgments - Whether exercisable only in cases where an appeal is pending in the Federal Court - Whether such power exercisable in cases*

H

where a review is sought under r. 137 of the Rules of the Federal Court 1995 - Whether s. 80 of the Courts of Judicature Act 1964 in pari materia with s. 44 of the same Act - Whether s. 80 of the Act ought to be similarly construed as s. 44

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Inherent powers*

I

of the court - Whether such power applicable where decision of the Federal Court is only being questioned, whether in law or on the facts of the case - Rules of the Federal Court, r. 137

EQUITY: *Equitable remedies and reliefs - Tracing - Property subject to trust sold to third party and purchase price paid to trustee - Action by beneficiary to enforce beneficial interest under the trust - Whether such action a proprietary claim - Whether such claim entitled beneficiary to trace beneficial ownership in the property into the purchase price in the hands of the trustee - Whether an order to disgorge trust property or the product or substitute thereof constituted a money judgment*

On 16 October 2009, the Federal Court allowed the appellant's appeal ('the principal judgment'). The court there declared that the appellant was a beneficiary under a constructive trust – in respect of certain property ('the property') – which bound the second respondent as trustee. On 27 October 2009, the court made certain orders to protect the property *in specie*. The court was subsequently informed that the trust property had been sold off unilaterally by the second respondent and that it had pocketed the proceeds of the sale. Thus on 16 November 2009 ('the second judgment'), the Federal Court *inter alia* made an order in the form of specific relief (a mandatory injunction) to give effect to its principal judgment of 16 October 2009. The second respondent applied to stay execution of the orders made both in the principal judgment and in the second judgment on the ground that it had filed an application for review under r. 137 of the Rules of the Federal Court 1995.

Held (dismissing the application for stay with costs)
Per Gopal Sri Ram FCJ:

(1) Section 80 of the Courts of Judicature Act 1964 ('the Act') – applicable to the Federal Court – is in *pari materia* with s. 44 of the Act. Section 44 confers similar power in the Court of Appeal. Section 44 has been construed to apply to cases where an appeal is pending before the Court of Appeal. Section 80 should be similarly construed. Section 80 empowers the Federal Court to make *interim* preservation orders to protect the integrity of an appeal or a leave application until it is finally disposed of. Once an application for leave is refused or an appeal is finally disposed of by the court, there is nothing left to protect or preserve. Once an appeal is disposed of there is no power in the Federal Court to stay its effect. Section 80 does not confer upon the Federal Court such a power. *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* (refd). (para 5)

(2) The principal judgment (16 October 2009) held that the appellant was a beneficiary under a constructive trust with the second respondent as trustee. The judgment merely declared the existence of a constructive trust and made no positive order. No committal or other execution process may be issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise. *Prakash Chand v. Grewal* (foll). (para 6)

(3) The Federal Court's conclusion that it had no power to stay execution of its judgment did not require the Court to comment on the merits of the review application. In any event, r. 137 cannot apply where a decision of the Federal Court is only questioned, whether in law or on the facts of the case. Further, counsel for the second respondent had misunderstood the case against his client. In the instant case, the appellant's claim was a proprietary claim entitling her to trace her beneficial ownership in the property into the purchase price in the hands of the second respondent. So long as a proprietary claim attaches, equity acting in personam will seek out and restore the property or its product or substitute to the wronged beneficiary, subject of course to the well known exceptions. *Badan Peguam Malaysia v. Kerajaan Malaysia* (refd); *Banque Belge Pour L'etranger v. Hambrouck* (foll); *Taylor v. Plumer* (refd). (paras 7, 8 & 9)

(4) In the instant case, the original thing was the building in which the partnership conducted its restaurant business. The "product or substitute for the original thing" was the purchase price that the second respondent received when it sold off "the original thing" so that the trust impressed on the immovable "original thing" followed into the "product or substitute" as it was "the nature of the thing itself". An order to disgorge trust property or the product or substitute thereof is not a money judgment. *Banque Belge Pour L'etranger v. Hambrouck* (foll); *Foskett v. McKeown* (refd). (paras 10, 11, 12, 13)

(5) The court is empowered to direct a non-party to pay the costs of any suit, appeal or other proceeding. In the instant case, it was not justice to order costs personally against Dato' Chong Yuet Hwa – the *alter ego* and sole directing mind and will of the second respondent and common law husband of the first

respondent – since he was not warned at the earliest opportunity that the appellant would apply for costs against him. *Aiden Shipping Ltd v. Interbulk Ltd* (foll); *Symphony Group plc v. Hodgson* (foll); *H. Leverton Ltd v. Crawford Off-Shore (Exploration) Service Ltd (in liquidation)* (1996), *The Times,* 22 November (refd); *Tolhurst v. Smith* (refd). (paras 14, 15, 16, 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Pada 16 Oktober 2009, Mahkamah Persekutuan membenarkan rayuan perayu ('penghakiman utama'). Mahkamah di situ mengisytiharkan bahawa perayu adalah benefisiari di bawah amanah konstruktif – berkenaan dengan hartanah tertentu ('hartanah itu') – yang mengikat responden kedua sebagai pemegang amanah. Pada 27 Oktober 2009, Mahkamah membuat perintah-perintah tertentu untuk melindungi hartanah *in specie*. Mahkamah kemudiannya diberitahu bahawa hartanah amanah telah dijual secara satu pihak oleh responden kedua dan bahawa ia telah mengambil hasil jualan itu. Oleh itu pada 16 November 2009 ('penghakiman kedua'), Mahkamah Persekutuan antara lain membuat suatu perintah dalam bentuk relief spesifik (suatu injunksi mandatori) untuk memberi efek kepada penghakiman utamanya pada 16 Oktober 2009. Responden kedua memohon untuk menggantungkan pelaksanaan perintah-perintah yang dibuat dalam kedua-dua penghakiman utama dan dalam penghakiman kedua atas alasan bahawa ia telah memfail sesuatu permohonan untuk semakan di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995.

Diputuskan (menolak permohonan untuk penggantungan dengan kos)
Oleh Gopal Sri Ram HMP:

(1) Seksyen 80 Akta Mahkamah Kehakiman 1964 ('Akta') – yang terpakai kepada Mahkamah Persekutuan – ialah *pari materia* dengan s. 44 Akta. Seksyen 44 memberi kuasa yang serupa dalam Mahkamah Rayuan. Seksyen 44 telah ditafsirkan terpakai kepada kes-kes dalam mana rayuan menunggu penyelesaian di hadapan Mahkamah Rayuan. Seksyen 80 sepatutnya ditafsirkan dengan serupa. Seksyen 80 memberi kuasa kepada Mahkamah Persekutuan untuk membuat perintah-perintah pengekalan *interim* untuk melindungi integriti suatu rayuan atau sesuatu permohonan untuk kebenaran

A sehingga ia akhirnya diselesaikan. Bila sesuatu permohonan untuk kebenaran ditolak atau suatu rayuan akhirnya diselesaikan oleh Mahkamah, tidak ada apa-apa yang tinggal untuk dilindungi atau dikekalkan. Bila suatu rayuan diselesaikan tidak ada kuasa dalam Mahkamah Persekutuan untuk
B menggantungkan efeknya. Seksyen 80 tidak memberi Mahkamah Persekutuan kuasa sebegitu. *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* (dirujuk).

(2) Penghakiman utama (16 Oktober 2009) memutuskan bahawa
C perayu adalah benefisiari di bawah suatu amanah konstruktif dengan responden kedua sebagai pemegang amanah. Penghakiman itu hanya mengisytiharkan kewujudan sesuatu amanah konstruktif dan tidak membuat perintah yang positif. Tiada komital atau proses pelaksanaan lain yang boleh
D dikeluarkan untuk menguatkuasakan suatu deklarasi. Oleh kerana suatu deklarasi tidak boleh dikuatkuasakan, soalan untuk menggantungkannya tidak berbangkit. *Prakash Chand v. Grewal* (diikuti).

E **(3)** Kesimpulan Mahkamah Persekutuan bahawa ia tidak ada kuasa untuk menggantungkan pelaksanaan penghakimannya tidak memerlukan Mahkamah untuk memberi komen atas merit permohonan semakan. Walau apapun, k. 137 tidak terpakai di
F mana satu keputusan Mahkamah Persekutuan hanya disoal, sama ada dalam undang-undang atau atas fakta-fakta kes. Tambahan lagi, peguam untuk responden kedua telah salah faham kes terhadap kliennya. Dalam kes semasa, tuntutan perayu ialah suatu tuntutan kepunyaan yang memberinya hak untuk mengesan hakmilik benefisialnya dalam hartanah itu
G kepada harga belian dalam tangan responden kedua. Selama tuntutan kepunyaan itu ditahankan, ekuiti bertindak in personam akan mencari dan mengembalikan hartanah atau produknya atau gantinya kepada benefisiari yang merupakan mangsa, tertakluk semestinya kepada pengecualian-pengecualian
H yang mantap. *Badan Peguam Malaysia v. Kerajaan Malaysia* (dirujuk); *Banque Belge Pour L'etranger v. Hambrouck* (diikuti); *Taylor v. Plumer* (dirujuk).

(4) Dalam kes semasa, perkara asal ialah bangunan dalam mana perkongsian menjalankan perniagaan restorannya. "Produk atau
I ganti untuk perkara asal" adalah harga belian yang responden kedua menerima apabila ia menjual "perkara asal" supaya amanah menekan atas "perkara asal" yang tidak boleh alih

diikuti kepada "produk atau ganti" kerana ia "sifat perkara itu tersendiri". Sesuatu perintah untuk menyerahkan kembali hartanah amanah atau produk atau gantinya bukan suatu penghakiman kewangan. *Banque Belge Pour L'etranger v. Hambrouck* (diikuti); *Foskett v. McKeown* (dirujuk).

(5) Mahkamah diberi kuasa untuk mengarahkan seseorang yang bukan pihak untuk membayar kos apa-apa guaman, rayuan atau prosiding lain. Dalam kes semasa, ia bukan adil untuk mengarahkan kos secara peribadi terhadap Dato' Chong Yuet Hwa – *alter ego* dan minda dan kehendak mengarahkan tunggal responden kedua dan suami common law responden pertama – kerana beliau tidak diberi amaran pada peluang yang paling awal bahawa perayu akan memohon untuk kos terhadapnya. *Aiden Shipping Ltd v. Interbulk Ltd* (diikuti); *Symphony Group plc v. Hodgson* (diikuti); *H. Leverton Ltd v. Crawford Off-Shore (Exploration) Service Ltd (in liquidation)* (1996), *The Times,* 22 November (dirujuk); *Tolhurst v. Smith* (dirujuk).

Case(s) referred to:
Aiden Shipping Ltd v. Interbulk Ltd [1986 AC 965 ***(foll)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***
Banque Belge Pour L'etranger v. Hambrouck [1921] 1 KB 321 ***(foll)***
Foskett v. McKeown [2000] 3 All ER 97 ***(refd)***
H Leverton Ltd v. Crawford Off-Shore (Exploration) Service Ltd (in liquidation) (1996) (The Times, 22 November) ***(refd)***
Prakash Chand v. Grewal [1975] Cri LJ 679 ***(foll)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2002] 4 CLJ 27 CA ***(refd)***
Symphony Group plc v. Hodgson [1994] QB 179 ***(foll)***
Takako Sakao v. Ng Pek Yuen & Anor (No 2) (Unreported) ***(refd)***
Taylor v. Plumer [1815] 105 ER 721 ***(refd)***
Tolhurst v. Smith [1995] EMLR 176 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 44, 80
National Land Code, s. 433B
Rules of the Federal Court 1995, r. 137

For the appellant - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners
For the 2nd respondent - Wong Kian Kheong (Harjinder Kaur, Alex Tan & Abigail Lai with him); M/s Tay, Tee & Nasir

[Appeal from Court of Appeal, Civil Appeal No: W-02-1236-2005]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram FCJ:

[1] This is an application to stay execution on the judgment of this court pending the outcome of an application by the second respondent to have this court review the principal judgment. The background to this application is as follows.

[2] On 16 October 2009, this court allowed the appellant's appeal, reversing the judgments of the courts below and holding that the appellant was the beneficiary under a constructive trust which bound the conscience of the second respondent as trustee. On 27 October 2009, orders were made to protect the subject matter of the trust *in specie*. On 13 November 2009, the court was advised that the subject matter of the trust had been sold off unilaterally by the second respondent and that it had pocketed the proceeds of the sale. An order in the form of specific relief was then made to give effect to the principal judgment of this court. The order that was made and the reasons for making it are set out in the second judgment issued in this appeal and dated 16 November 2009. (See, *Takako Sakao v. Ng Pek Yuen & Anor (No. 2)* (Unreported)).

[3] Today, that is to say, on 26 November 2009, we were moved to stay execution of the orders made both in the principal judgment and in the second judgment dated 16 November 2009 on the ground that an application for review under r. 137 of the Rules of the Federal Court 1995 had been filed this morning. Two submissions were made in support of the application. First it was submitted by learned counsel for the second respondent that this court had jurisdiction and power to hear and determine this application and grant a stay pursuant to s. 80 of the Courts of Judicature Act 1964 ("the Act"). That section reads as follows:

> (1) In any proceeding pending before the Federal Court any direction incidental thereto not involving the decision of the proceeding, any *interim* order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Federal Court.
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> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Federal Court.

(3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[4] It was argued the section should be construed widely as to include post judgment applications that seek a stay of execution pending the hearing of an application to review. No authority was cited in support of these submissions.

[5] It is to be noted that s. 80 is in *pari materia* with s. 44 of the Act, the latter conferring similar power in the Court of Appeal. The latter section has been interpreted as applying to cases where an appeal is pending before that court. See, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2002] 4 CLJ 27. In our judgment s. 80 should be construed likewise. When viewed in its proper perspective, what s. 80 is designed to address is a situation where there is either an application for leave to appeal or an appeal pending before this court the integrity of which is required to be preserved. It would be futile for an appellant or an intended appellant to prosecute his appeal or application for leave before this court if the subject matter of the appeal is dissipated or otherwise disposed of. Power is necessary in an appellate court, in particular the apex court, to preserve and maintain the status quo until the matter is finally disposed of. Section 80 does precisely that. It empowers us to make *interim* preservation orders to protect the integrity of an appeal or a leave application until it is finally disposed of. Once an application for leave is refused or an appeal is finally disposed of by this court, there is nothing left to protect or preserve. If the second respondent's argument is correct then an appellant who fails in his appeal will equally be entitled to ask for a stay pending a review. That proposition need only be stated to recognise its fallacy. Once an appeal is disposed of there is no power in this court to stay its effect. And s. 80 certainly does not confer such a power upon us.

[6] There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, *inter alia*, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution. In *Prakash Chand v. Grewal* [1975] Cri LJ 679, the court held as follows:

A A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgement-debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.

B

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

C **[7]** The second submission made by the appellant is that there are merits in the review application for two reasons. First, because this court in the principal judgment misconstrued s. 433B of the National Land Code 1965 and the judgment is therefore *per incuriam*. Learned counsel argued that his client has a good chance D of succeeding in the review of the earlier judgment delivered in this very case. Without entering upon the merits of counsel's submission we find it sufficient to say that the conclusion reached that this court has no power to stay execution of the judgment does not require us to comment on this point. In any event, we E think it is now clear that r. 137 "cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case." (*Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833, per Zaki Tun Azmi CJ.)

F **[8]** The second reason advanced by learned counsel is this. The order we made on 16 November 2009 directing the second defendant to make pay half the purchase price to the appellant's solicitors to be held by them for their client is a money judgment which cannot carry a penal notice as it does in this case. As we G understand counsel, that order is liable to be set aside *ex debito justitae* on his client's review application. With respect, we apprehend that learned counsel has misunderstood the nature of the case against his client. What the appellant sought is the enforcement of her beneficial interest under a constructive trust. H Being a proprietary claim, she is entitled to trace her beneficial ownership in the property into the purchase price now in the hands of the second respondent. It is trite that for so long as a proprietary claim attaches, equity acting *in personam* will seek out and restore the property or its product or substitute to the I wronged beneficiary subject of course to the well known exceptions already alluded to in the principal judgment. And we need do no more than to refer to *Banque Belge Pour L'etranger v. Hambrouck* [1921] 1 KB 321 as authority for that proposition.

[9] The facts of that case will be notoriously familiar to any student of equity. Hambrouck worked for Pelabon who banked with the plaintiff bank. By fraud or forgery, Hambrouck drew monies of Pelabon's account with the plaintiff bank. He used these monies to pay his mistress, a Belgian lady called Spanoghe. She paid a portion of the monies into her bank. When the fraud was discovered, she had £315 in her account. The plaintiff bank sued to recover this money which it had been deprived of by Hambrouck's fraud. The claim was for money had and received and the bank sought to follow the money into Spanoghe's account. Her defence, *inter alia*, was that the money had passed through several hands and hence could not be identified as the plaintiff bank's money. However, it is important to note that the relief claimed by the bank was not for a money judgment. It was for an order that the money in the hands of Spanoghe's bank (which by that time had been paid into court) be paid out to the plaintiff. We may take up the rest from the judgment of Atkin LJ:

> In giving judgment however, the learned judge has treated the claim as one for money had and received, and the judgment entered is an ordinary judgment against the appellant on a money claim for 315£ together with an order that the sum in Court should be paid out to the plaintiffs in part satisfaction. **The two forms of relief are different,** and though in this case there is no substantial difference in the result, the grounds upon which relief is based might have been material.
>
> First, does it make any difference to the plaintiffs' rights that their money was paid into Farrow's Bank, and that the money representing it drawn out by Hambrouck was paid to the defendant Bank on deposit? If the question be the right of the plaintiffs in equity to follow their property, I apprehend that no difficulty arises. The case of *In re Hallett's Estate* 13 Ch D 696 makes it plain that the Court will investigate a banking account into which another person's money has been wrongfully paid, and will impute all drawings out of the account in the first instance to the wrongdoer's own moneys, leaving the plaintiff's money intact so far as it remains in the account at all. There can be no difficulty in this case in following every change of form of the money in question, whether in the hands of Hambrouck or of the appellant, and it appears to me that the plaintiffs were, on the grounds alleged in the statement of claim, entitled to a specific order for the return of the money in question, and, as it is now represented by the sum in Court, to payment out of Court of that sum. (emphasis added)

[10] Atkin LJ then quoted the following observation of Lord Ellenborough in *Taylor v. Plumer* [1815] 105 ER 721:

> ... the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.

[11] Atkin LJ then uttered these famous words:

> But if in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books: *In re Hallett's Estate*. I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings. If, following the principles laid down in *In re Hallett's Estate*, it can be ascertained either that the money in the bank, or the commodity which it has bought, is 'the product of, or substitute for, the original thing,' then it still follows 'the nature of the thing itself.' On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received.

[12] We conclude by saying that a most instructive modern application of the process of tracing trust property is to be found in *Foskett v. McKeown* [2000] 3 All ER 97.

[13] In the present case, the original thing was the building in which the partnership conducted its restaurant business. The "product or substitute for the original thing" is the purchase price that the second respondent received when it sold off "the original thing" so that the trust impressed on the immovable "original thing" follows into the "product or substitute" as it is "the nature of the thing itself". And as may be seen from the judgment of Atkin LJ quoted above, an order to disgorge trust property or the product or substitute thereof is not a money judgment.

[14] For these reasons the application was dismissed with costs which were fixed at RM25,000. Learned counsel for the appellant then moved us to order that Dato' Chong Yuet Hwa, the deponent of the affidavit in support of the application for a stay be directed to pay the costs out of his own pocket. This gentleman is the person found by the High Court to be the *alter*

ego and sole directing mind and will of the second respondent. He is also the common law husband of the first respondent. Two questions arise: (i) whether it is permissible to order that the costs be paid by him and (ii) if the answer is in the affirmative, then, whether such an order should be made here.

[15] Dealing with the first question, it is now settled that a court has power to direct a non-party – and for present purposes Dato' Chong is a non-party – to pay the costs of any suit, appeal or other proceeding. This was established by the decision of the House of Lords in *Aiden Shipping Ltd v. Interbulk Ltd* [1986 AC 965. In *Symphony Group plc v. Hodgson* [1994] QB 179, the English Court of Appeal in the judgment of Balcombe LJ laid down the following guidelines for the making of a costs order against a non-party:

> (1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in A*iden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] AC 965, 980F. The judge should treat any application for such an order with considerable caution.
>
> (2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to eg, the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a Calderbank offer (*Calderbank v. Calderbank* [1976] Fam. 93); and the knowledge of what the issues are before giving evidence.
>
> (3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15, r. 6(2)(b)(i) or (ii).
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> Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.
>
> (4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v. Rashidian* [1985] 1 WLR 1337.

(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function: see *Bahai v. Rashidian* [1985] 1 WLR 1337, 1342H, 1346F.

(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v. F. Hewthorn & Co. Ltd.* [1943] KB 587; *Cross on Evidence,* 7th ed. (1990), pp. 100-101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v. Spiro* [1938] 1 KB 176, 192, cited with approval by this court in *Bahai v. Rashidian* [1985] 1 WLR 1337 1343D, 1345H. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer v. Durnford Ford* [1992] QB 483, 487. In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.

(8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company: see *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 WLR 510, 513.

(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I.

1989 No. 339/89), and in particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations – see *Orchard v. South Eastern Electricity Board* [1987] QB 565 – and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred.

[16] On the issue whether a non-party would suffer prejudice if we ordered him or her to pay costs personally, we find two further authorities of assistance. The first is *H. Leverton Ltd v. Crawford Off-Shore (Exploration) Service Ltd (in liquidation)* (1996), The Times, 22 November. That was a case in which Garland J made an order of costs against Mr Christopher Richard Crawford, a non-party who was the sole directing mind and will of the defendant company and for all practical purposes the company itself. It was held that the making of such an order against Mr Crawford did no injustice to him because of his closeness to the proceedings. It is to be noted that in Leverton the order was sought after giving notice to the defendant.

[17] The other case is *Tolhurst v. Smith* [1995] EMLR 176 where Chadwick J (later LJ) after dismissing an action brought by an individual plaintiff ordered costs against a company called Lawrence Tolhurst Music Company Limited on the ground that the company was Mr Tolhurst's *alter ego*. But we notice from the report of that case that there an application by *inter partes* motion was made to Chadwick J seeking the special order as to costs.

[18] In the present case, learned counsel for the second respondent complains that he and indeed Dato Chong are caught by surprise by the appellant's oral application. He says that if adequate notice had been given, he would have come prepared to meet the argument advanced against him. In our judgment there is merit in this submission. If you look at the third guideline in the *Symphony* case, you will see that the successful party must "warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him." That did not happen here. It is not justice, no matter what the indignation one may feel at the conduct of Dato Chong, to make an order for costs against him personally in the present circumstances. The appellant's application in that behalf was accordingly refused.

[19] Before concluding, there is one matter of which mention must be made. During the hearing, on not less than three occasions, learned counsel for the second respondent was invited to consider making an oral application for an extension of time to comply with the order of 16 November 2009 which we were prepared to entertain. This rather generous offer was however declined in the second respondent's final submission.